Supreme Court, U.S.
FILED
FEB 18 1999
CLERK

No. 98-1164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT N. COLWELL, CHARLES R. ELLINGER
and RICHARD H. ABRAMS, JR.

Petitioners,

vs.

SUFFOLK COUNTY POLICE DEPARTMENT
and THE COUNTY OF SUFFOLK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Have the Petitioners established that "compelling reasons" exist for this Court to grant the writ where the gravamen of the Petition is that the United States Court of Appeals for the Second Circuit erred when it concluded that there was insufficient evidence to support the jury's finding that the Petitioners were disabled within the meaning of the Americans with Disabilities Act?

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STATEMENT OF THE CASE

The Petitioners in this case are three veteran police officers, two sergeants and one lieutenant, who are employed by the County of Suffolk, New York. They claimed that they were denied promotions to higher ranks in February 1993, as a result of unlawful discrimination under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* (hereinafter referred to as the "A.D.A."). Each police officer spent a substantial part of his career assigned to "limited" or "light" duty under N.Y. General Municipal Law § 207-c (McKinney 1986) as a result of injuries sustained while performing his duties. Two of the officers complained of back pain. The third was afraid of stressful situations even though he had long since recovered from a subarachnoid hemorrhage sustained in 1984. In fact, this officer had been found fit for full duty in 1992 by Dr. Leonard Weitzman, a physician for the Respondent Suffolk County Police Department (hereinafter referred to as the "County" or the "SCPD"). Despite their alleged maladies, each of the police officers got up, got dressed and went to work every day. Each officer failed to present any evidence that he suffered from a condition which substantially limited one or more of the major activities of life.

The extent of the evidence of Petitioner Robert N. Colwell's (hereinafter referred to as "Colwell") physical limitations consisted of an inability: to stand around the mall while his wife tries on dresses; to work on his daughter's car; to golf or ski; to sit for two days (during the course of the trial) without discomfort; to stand at attention (military style) for a long period of time and to drive for more than a couple of hours without stretching.

Petitioner Charles R. Ellinger (hereinafter referred to as "Ellinger") described his physical limitations by stating that

he needs to do heavy work, like digging and planting in the summer time, at a slow pace, and that he needs to wear hats and avoid physical exercise in the winter time. The only other evidence of physical limitations that Ellinger produced consisted of a letter from Dr. Steven Friedling dated December 1, 1992, which stated that Ellinger needed to avoid stress, confrontation, late tours and rotating shifts. Dr. Friedling's letter indicated that Ellinger was capable of working indoors and days as well as overtime between the hours of 8:00 a.m. - 8:00 p.m.

Petitioner Richard H. Abrams, Jr. (hereinafter referred to as "Abrams") testified that his physical limitations amounted to an inability: to do tune-ups, brake jobs and mechanical work on his automobiles; to bend over for long periods; to continuously reach up when painting or plastering; to lift heavy objects; and to move furniture. He also testified that he has trouble doing yard work, like raking, and that he cannot drive, sit or stand in one position for long periods of time without stretching.

Abrams was the only Petitioner to offer testimony of a treating physician. Dr. Donald Holzer, a neurologist, testified merely that Abrams was capable of doing sedentary work and that:

> [h]e can certainly infrequently reach over his shoulder, bend, twist, he can lift objects maybe ten to twenty pounds infrequently. He can stand and walk for short periods of time, maybe a half an hour to an hour at a time. He certainly is capable of working an 8 hour day with limitations.

Despite this glaring lack of proof, the police officers were able to persuade the jury, and the District Court, that they were disabled. Essentially, each police officer successfully parlayed

his light duty status, and the fact he was not promoted, into a finding of discrimination under the A.D.A. There was, however, no evidence that the conditions which sometimes prevented the Petitioners from performing the full duties of a police officer, also substantially limited them from performing one or more of the major activities of life.

Upon the close of Petitioners' case, the County moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a). On March 18, 1997, following submission of the case to the jury, a verdict was returned in favor of the Petitioners.

On June 26, 1997, the District Court issued a memorandum and order which denied the County's Rule 50(a) motion. The District Court entered judgment on June 27, 1997.

On August 4, 1997, the District Court issued a memorandum and order which denied the County's motion pursuant to Fed. R. Civ. P. 50(b), for judgment notwithstanding the verdict or for a new trial pursuant to Fed. R. Civ. P. 59.

The County appealed the District Court's denial of judgment as a matter of law to the United States Court of Appeals for the Second Circuit (hereinafter referred to as the "Second Circuit"). The Second Circuit, by decision dated October 15, 1998, held that "there was insufficient evidence to support the jury's finding that the officers were disabled within the meaning of the A.D.A." This Petition for a Writ of Certiorari ensued.

PERCEIVED MISSTATEMENTS MADE IN THE PETITION

Colwell, Ellinger and Abrams have mischaracterized the evidence that was adduced at trial in many significant respects. In accordance with Supreme Court Rule 15.2, the following

represents a list of the perceived misstatements and mischaracterizations in the order that they appear in the Petition for a Writ of Certiorari.

Colwell, Ellinger and Abrams claim that each suffered from "chronic debilitating impairments", that each "had a long record of disability" and that each of them was "perceived by Respondents as being disabled." *See* Petition for a Writ of Certiorari at page 2.[1] These conclusory allegations are unsupported by the record. In fact, the medical documentation offered at trial by Colwell, Ellinger and Abrams did not demonstrate that any of them was substantially limited in the performance of one or more major life activities. The only records produced by Colwell, Ellinger and Abrams consisted of forms of the SCPD's Medical Evaluation Unit, the Suffolk County Department of Health Services and the Office of Employee Medical Review. Those forms reflected the fact that each of the Petitioners' had been placed on light duty status with the following limitations: no confrontation, no heavy lifting, no rotating shifts, no strenuous exertion, day shifts and desk work [plaintiffs' exhibits "29" (R. 1267)[2], "58-8" (S.A. 23)[3], "58-9" (S.A. 24), "58-10" (S.A. 25), "58-11" (S.A. 26), "58-12" (S.A. 27), "58-13" (S.A. 28), "58-18" (S.A. 30), "58-18.2" (S.A. 31), "58-18.3" (S.A. 32), "58-18.4" (S.A. 33), "58-20" (S.A. 34), "59-11" (S.A. 42), "59-18" (S.A. 43), "60-8" (S.A. 46), "60-10" (S.A. 47), "60-13" (S.A. 49), "60-14" (S.A. 50), "60-15" (S.A. 51), "60-18" (S.A. 53), "60-19" (S.A. 54), "60-20" (S.A. 20), "60-21" (S.A. 56), "60-22" (S.A. 57), "60-22" (S.A. 58), "60-23" (S.A. 59), "60-24" (S.A. 60), "60-25" (S.A. 61), "60-26" (S.A. 62), "60-27" (S.A. 63), "60-28" (S.A. 64), "60-29" (S.A. 65), "60-30" (S.A. 66), "60-

1. Hereinafter references to the Petition for a Writ of Certiorari will be referred to as "Petition".

2. References preceded by "R." are to pages in the Joint Appendix filed with the Second Circuit Court of Appeals.

3. References preceded by "S.A." are to pages in the Supplemental Appendix filed with the Second Circuit Court of Appeals.

31" (S.A. 67), "60-32" (S.A. 68), "60-33" (S.A. 69), "60-34" (S.A. 70), "60-35" (S.A. 71), "60-36" (S.A. 72), "60-37" (S.A. 73), "60-38" (S.A. 74), "60-39" (S.A. 75), "60-42" (S.A. 76)].

The only other record of limitations produced were forms from the Suffolk County Department of Health Services, Office of Employee Medical Review. According to those forms, Abrams was restricted from "bending" and "prolonged sitting or standing" [plaintiffs' exhibit "59-22" (S.A. 44)], and Colwell was restricted from "bending", "prolonged driving", and "prolonged sitting" [plaintiffs' exhibit "59-22" (S.A. 44), "60-11" (S.A. 48)].

None of the documentary evidence cited above demonstrated that any of the Petitioners suffered from an impairment that substantially limited them in the performance of any major life activities. That evidence, and the testimony at trial, simply showed that each of the Petitioners, at one time or another, was restricted from performing the full duties of a police officer.

Another example of Petitioners' embellishment of the record is the description of Ellinger's hospital stay for a cerebral hemorrhage he sustained in 1984. According to the Petition, "He [Ellinger] was rushed to the hospital by ambulance and was confined to an intensive care unit for approximately 30 days." *See* Petition at page 2. While Ellinger testified that he was hospitalized for approximately thirty days following his cerebral hemorrhage, the only reference to "the intensive care unit" appeared in an injured employee report submitted by Sergeant John Byrnes, dated October 12, 1984 [plaintiffs' exhibit "58-17" (S.A. 29)]. This report indicated that Ellinger was in the intensive care unit of St. John's Episcopal Hospital on October 12, 1984, three days after the hemorrhage.

Similarly, Ellinger's description of the six month period following his temporary hospital stay also mischaracterizes the evidence. According to the Petition, "After leaving the hospital he [Ellinger] was treated by his family physician, a neurologist and neurosurgeon, and confined to six months of bed rest." *See* Petition at page 2. Although Ellinger testified that he was out of work for approximately six months, he did not offer any evidence that he was confined to bed for six months or that any of his doctors had recommended bed rest for six months.

Ellinger states that "Although his [Ellinger's] physical condition stabilized, it continued to be debilitating and chronic and he always had to compensate for it." *See* Petition at page 2. Ellinger, however, fails to describe the evidence that showed how he compensated for this so called "debilitating" condition. According to Ellinger's testimony, he did heavy work, like digging and planting in the summertime, at a slow pace, he wore hats and avoided physical exercise in the wintertime (R. 377), and in stressful situations, he practiced "thinking good thoughts" (R. 377) and "picturing the sun coming through the clouds to erase all [his] fears." (R. 381).

Additionally, Ellinger's various complaints of pain which appear in the Petition, are not in the trial record. Ellinger alleges that "he used biofeedback techniques to try to calm down to control the pressure and pain." *See* Petition at page 3. Ellinger testified at trial that he used biofeedback for a "sensation that would begin at the top of my head and spread out towards the back and the front." (R. 377). He did not mention any pressure or pain when he testified before the jury.

Another example of Ellinger's mischaracterization of the trial record is his claim that "he could not do any type of heavy physical work" and "if he had to do something physical, he would have to do it very slowly to avoid the pain in his head."

See Petition at page 3. Ellinger actually testified at trial that, "If I were going to do heavy work, either I wouldn't do it, or I would do it very slowly." (R. 378). Once again, he did not testify about any pain in his head or about a complete inability to do heavy work.

Still another example of Ellinger's reference to pain not found in the record is his allegation that "[e]xposure to the elements, such as cold in the winter, could also cause him to react with pain." *See* Petition at page 3. Although Ellinger testified that he needed to wear hats in the winter time, he did not testify that this was done in reaction to pain (R. 377).

Although Ellinger states that he "was only able to work within the light duty parameters established by the Respondents" (*see* Petition at page 3), this is misleading because the evidence shows that Dr. Weitzman, a physician employed by the SCPD, found Ellinger fit for full-duty on December 1, 1992 (R. 338). The record shows that Ellinger chose to ignore the police surgeon and decided instead that he would follow the restrictions that were recommended by his personal physician (R. 380).

The following excerpt is among the most glaring examples of Ellinger's unfair depiction of his alleged limitations:

> Sergeant Ellinger is substantially limited in performing manual tasks and can tolerate very little exertion compared to the average person of the general population.

See Petition at page 3.

Ellinger's limitations with respect to manual tasks were previously addressed herein and amounted to: doing heavy

work, like digging or planting in the summer time, at a slow pace and wearing hats and avoiding physical exercise in the winter time (R. 377). The only other limitation that Ellinger testified to with respect to a manual task was shoveling snow; "If I was to shovel a driveway in the snow, if I was to push, I would feel it." (R. 377).

Not only does Ellinger omit material facts contained in the record, but he also adds facts not in evidence when he claims that, "[t]he original cerebral hemorrhage was very severe; and its residual effects will be of life time duration." *See* Petition at page 3. There was no evidence produced at trial regarding the severity of Ellinger's subarachnoid hemorrhage or any prognosis. In fact, the only medical evidence submitted by Ellinger was that of the SCPD's physician, Dr. Weitzman, who found that Ellinger's hypertension was under control and that he was fit for full duty status (R. 339).

Like Ellinger, Colwell also omits pertinent details in his statement of the case. Colwell states in the Petition that "he is only able to drive for short periods of time and is limited in the type of manual task that he can perform." *See* Petition at page 4. Colwell fails to explain, however, that his definition of a short period of time was, "If I'm going for a two or three or four hour drive, I have to stop and stretch my legs and walk around . . ." (R. 255).

While Colwell states in the Petition that he cannot do general work around the house (*see* Petition at page 4), he testified at trial that he does basic chores (R. 255) and that he has no problem with normal, everyday activities (R. 302).

Although Colwell claims that he is limited in "his ability to lecture for any length of time" (*see* Petition at page 4), he testified specifically that "it becomes a problem in instructing

for more than an hour at a time." (R. 257). Colwell's purported difficulty with shopping and going on vacation (*see* Petition at page 4), were qualified in his trial testimony as "I can't go shopping in the mall and stand around while [my wife] tries on dresses", (R. 257) and "I have a hard time again going on a vacation in driving situations." (R. 257).

Additionally, Colwell claims that he had difficulty doing "any of the things which he did prior to his disability." *See* Petition at page 4. The only other activities, however, that Colwell testified to at trial and that were not mentioned in the Petition were his inability to ski or golf (R. 257). Colwell also asserts in the Petition that his doctors prohibited him from performing "the manual tasks he once performed." *See* Petition at page 4. The only evidence of any limitations placed upon Colwell by any medical professional were the light duty limitations on confrontation, heavy lifting, prolonged sitting, prolonged standing, prolonged bending and prolonged driving, which were recommended by the physicians employed by the SCPD.

Abrams has also embellished the record. Abrams claims that he cannot do yard work. *See* Petition at page 6. He testified, however, that he has trouble with yard work (R. 535). Abrams also claims that he cannot reach up. *See*, Petition at page 6. Abrams testified that, "If I spend any time reaching up as far as painting or plastering or anything like that, then it affects me." (R. 535). Abrams states that he has difficulty with driving. *See* Petition at page 6. At trial he simply explained that he had to "stop and get out and walk around and stretch out a little bit" when driving for periods of time (R. 536).

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE FAILED TO ESTABLISH JURISDICTION FOR REVIEW OF THE ORDER APPEALED FROM AS REQUIRED BY RULE 10 OF THIS COURT.

In *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385, __ (1991), this Court stated that:

> [a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States Courts of Appeals and state courts concerning the meaning of provisions of federal law.

In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897, __ (1955), this Court, in considering the meaning of the phrase "special and important reasons" within the context of the former version of Rule 10 of the Supreme Court Rules, noted that it does not sit for the "benefit of the particular litigants", and declared that the issue presented must involve "a problem beyond the academic or the episodic." The Court stressed that:

> it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between Circuit Courts of Appeals.

Id. at 79, 75 S. Ct. at 620, 99 L. Ed. at __, *quoting Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct.

422, 423, 67 L. Ed. 712 (1923). Under Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

None of the considerations specified in Rule 10 are in any way legitimately implicated by the issues presented in this Petition. In tacit recognition of this obstacle to the granting of the writ, the Petitioners argue instead that juries, and not the Courts, should have plenary power to decide what impairments do or do not "substantially limit one or more major life activities". *See* Petition at page 8. This proposition, however, ignores the authority of the federal courts under Fed. R. Civ. P. 50 to protect a party from a verdict that has no legally sufficient evidentiary basis. Moreover, the Petition advances no authority for the unique propositions that the federal courts are without authority to determine what evidence is or is not legally sufficient to demonstrate the existence of an impairment that "substantially limits a major life activity" and that juries should be left to arbitrarily decide that question as they see fit.

The Petitioners also argue, without any authority, that Congress' intent to enact remedial legislation has been thwarted by the Second Circuit and by other Courts of Appeals who have refused to allow every impairment, no matter how insubstantial, to lead to a plaintiff's verdict. The Petitioners do not argue in any inciteful manner that the Second Circuit in this case, or any of the other Courts of Appeals in the cited cases, applied an erroneous standard when reviewing A.D.A. cases in which the phrase "substantially limits" was at issue. Moreover, the Petitioners do not suggest what the governing rule of law should be. Instead, the Petitioners' only solution to the alleged problem is, again, a ruling from this Court that the phrase "substantially limits" means whatever a jury decides that it should mean. It is respectfully submitted that certiorari should not be granted for this purpose.

The Petitioners also claim that the decision of the Second Circuit, and of the other Courts of Appeals, "goes against the spirit of the Court's holding in the recent case of *Bragdon v. Abbott*, __ U.S. __, 118 S. Ct. 2196 (1998)." *See* Petition at page 10. By the use of the undefined and uncited "spirit" standard, the Petitioners attempt to evade the need to address and to meet the standard for granting review on certiorari set forth in Rule 10(c) of the Rules of the Supreme Court: ". . . a United States court of appeals . . . has decided an important federal question in a way that *conflicts with* relevant decisions of this Court." (emphasis added). In fact, the Second Circuit carefully and correctly applied *Bragdon* in its decision in this case.

In *Bragdon*, the respondent suffered from asymptomatic HIV infection. After an analysis of the dangers and risks associated with transmission of the disease to a partner or an offspring, this Court held that respondent was substantially limited in the major life activity of reproduction, *Bragdon*, *supra*, 524 U.S. at __, 118 S. Ct. at 2202-2207, 141 L. Ed. 2d at __. Petitioners fail to point out any conflict between this Court's decision in *Bragdon* and the Second Circuit's decision in the case at bar. The Second Circuit relied on *Bragdon* in finding that the evidence failed to show that the Petitioners were substantially limited in the performance of one or more major life activities. The Second Circuit held that:

> [t]he third step in the *Bragdon* analysis is to determine whether the plaintiff's impairment "substantially limits" the major life activities that are properly deemed major. This inquiry is individualized and fact-specific.

Colwell v. Suffolk County Police Dept., 158 F.3d 635, 643 (2d Cir. 1998), *citing Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 152 (2d Cir. 1998); *Ryan v. Grae*

& Rybicki, 135 F.3d 867, 872 (2d Cir. 1998); *see also Bragdon*, 118 S. Ct. at 2206; (A. 13a)[4]. The Second Circuit then carefully reviewed the evidence adduced by each of the Petitioners, [*Colwell*, *supra*, 158 F.3d at 639-647; (A. 15a-17a)] and concluded "that each of the [Petitioners] failed to advance evidence sufficient to show that the limitation he suffered with respect to a major life activity was substantial." *Colwell*, 158 F.3d at 645; (A. 17a). The Petition for a Writ of Certiorari should be denied because its primary purpose is to simply have this Court review the sufficiency of the evidence determinations made by the Second Circuit.

This Court, in finding that the Respondent in *Bragdon* was substantially limited in the major life activity of reproduction, commented that "[t]he Act addresses substantial limitations of major life activities, not utter inabilities." *Bragdon*, *supra*, 524 U.S. at __, 118 S. Ct. at 2206, 141 L. Ed. 2d at __. The Petitioners grasp onto this one line, in an attempt to show that the Second Circuit applied a stricter standard for establishing a disability than the standard applied by this Court in *Bragdon*.

The Second Circuit did not require the Petitioners to show "utter inabilities" in the performance of major life activities, but rather it correctly utilized the definition of "substantially limits" as set forth by the EEOC:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or is
>
> (ii) Significantly restricted as to the condition manner or duration under which an individual

4. References preceded by "A" are to the appendix of the Petition for Writ of Certiorari.

> can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. §1630.2(j)(1).

Colwell, *supra*, 158 F.3d at 643; (A. 13a-14a).

The Second Circuit also properly utilized the following factors recommended by the regulations in its determination that the Petitioners were not substantially limited in a major life activity:

> (i) the nature and severity of the impairment;
>
> (ii) the duration or expected duration of the impairment; and
>
> (iii) the permanent or long term impact or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. § 1630(j)(2).

Colwell, *supra*, 158 F.3d at 643; (A. 14a).

For these reasons, the Petitioners' argument that the Second Circuit somehow ran afoul of this Court's decision in *Bragdon* is without merit. Accordingly, the Petition for a Writ of Certiorari should be denied.

II.

THE SECOND CIRCUIT APPLIED THE PROPER STANDARD OF REVIEW IN DETERMINING THAT THE PETITIONERS HAD NOT PRODUCED SUFFICIENT EVIDENCE OF A DISABILITY UNDER THE A.D.A.

Petitioners also contend that the Second Circuit improperly substituted its judgment for that of the trier of fact and the trial judge. *See* Petition at pages 10-16. This contention is not supported by the record or by legal precedent.

The Second Circuit applied the proper standard for review when it reversed the District Court's denial of Respondents' motion for judgment as a matter of law:

> In reviewing the denial of judgment as a matter of law, we view the evidence in the light most favorable to the nonmoving party and will reverse "only if [we] can conclude that, with credibility assessments made against the moving party and all inferences drawn against the moving party, a reasonable juror would have been compelled to accept the view of the moving party."

Colwell, 158 F.3d at 641, *citing Bradway v. Gonzales*, 26 F.3d 313, 317 (2d Cir. 1994); (A. 7a-8a).

Colwell and Abrams claim that the Second Circuit departed from the above standard and improperly assessed their credibility when the Court found that their descriptions of their limitations were "marked throughout by hedging and a studied vagueness" and were "carefully qualified" and that Dr. Holzer's testimony was "vague and qualified." *See* Petition at pages 14

and 16. By using that terminology, the Second Circuit was merely articulating its evaluation of the sufficiency of the evidence as revealed by the transcript of the Petitioners' and Dr. Holzer's testimony. This is a far cry from rejecting testimony that is legally sufficient on its face, but is nevertheless rejected because it is not credible. Therefore, Petitioners' contention that the Second Circuit improperly assessed their credibility is erroneous.

Petitioners, in further support of their argument that the Second Circuit substituted its judgment for that of the District Court, state that the District Court credited the medical testimony of Dr. Robert Reiss, a police surgeon, as "corroborating Colwell's claims and supporting 'the jury's conclusion that Colwell was disabled at the time he was not promoted.' " *See* Petition at page 14. On appeal to the Second Circuit, Respondents pointed out that at trial, the District Court specifically instructed the jury not to consider the testimony of Dr. Reiss as evidence of Colwell's physical condition because Dr. Reiss did not conduct any medical examinations of his own (R. 466). Clearly, the District Court erred in crediting Dr. Reiss' testimony as evidence of a disability when it had instructed the jury to disregard that same testimony. Therefore, no reasonable juror could have found that Dr. Reiss' testimony supported Colwell's claim of disability.

Ellinger also claims that the Second Circuit usurped the findings of the judge and jury when it held that there was insufficient evidence to find that he was substantially limited in the major life activity of work. Ellinger argues that the restrictions on his work schedule could apply to "any position" and "[t]herefore there was no need for specific evidence about 'the kinds of jobs from which an impaired individual is disqualified.' " *See* Petition at page 15. The case law, however, unequivocally holds to the contrary. *Ryan v. Grae & Rybicki*,

P.C., 135 F.3d 867, 872 (2d Cir. 1998); *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 723-724 (2d Cir. 1994), *cert. denied*, 513 U.S. 1147, 115 S. Ct. 1095, 130 L. Ed. 2d 1063 (1995).

The Second Circuit correctly held that neither Colwell, Ellinger nor Abrams were substantially limited in the major life activity of work. *Colwell*, *supra*, 158 F.3d at 643-645; (A. 14a-15a). In so finding, the Second Circuit applied the proper standard of review and rendered a decision that was supported by the evidence of record and was entirely consistent with the A.D.A. and the case law. Accordingly, the Petition for a Writ of Certiorari should be denied.

III.

A POLICE OFFICER'S ASSIGNMENT TO LONG TERM LIGHT DUTY IS NOT EVIDENCE OF A RECORD OF DISABILITY UNDER THE A.D.A.

In an effort to invoke this Court's jurisdiction, Petitioners argue that their "long term" assignment to light duty created a record of disability under the A.D.A. *See* Petition at pages 16-18. The Second Circuit, however, did not err in its decision on this issue either. In fact, the Second Circuit noted that it would be anomalous to find that an employer, like the County, that "accedes to minor and potentially debatable accommodations", like the assignment of a police officer to light duty, "thereby stipulate[s] to the employee's record of a chronic and endless disability." *Colwell, supra*, 158 F.3d at 646; (A. 21a).

In order for Colwell, Ellinger and Abrams to have established a disability under the A.D.A. by demonstrating a record of impairment, each of them was required to prove "a record of a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(2);

Williams v. Kerr-McGee Corp., 1997 U.S. App. LEXIS 6366, *aff'd*, 110 F.3d 74 (10th Cir. 1997); 29 C.F.R. Part 1630 Appendix, Section 1630.2(k).

Colwell, Ellinger and Abrams point to their personnel files, performance reports and duty assignments in an attempt to claim that they established evidence of a disability through a record of an impairment. As addressed in Point I above, they failed to produce any specific record or document which indicated that any of them was substantially limited in the performance of one or more major life activities. All of the evidence demonstrated that Colwell, Ellinger and Abrams were able to work light-duty assignments on a full-time basis.

Petitioners further claim that "evidence of a record of a substantial limitation for an extensive period is independently probative of whether the Petitioners were disabled within the meaning of the A.D.A." *See* Petition at page 17. Petitioners, however, were unable to establish any record of a substantial limitation of a major life activity, let alone a record of a long term substantial limitation of a major life activity.

While work is a "major life activity" under the A.D.A., "an impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." *Heilweil*, *supra*, 32 F.3d at 723 (2d Cir. 1994); *Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379, 383-384 (2d Cir. 1996). It necessarily follows that the inability to perform all of the duties of a police officer in the State of New York, and in the County of Suffolk [*see* N.Y. Exec. L. § 835[7] (McKinney 1996)], does not mean that a police officer who is on light duty assignment has an impairment that substantially limits the major life activity of working. A history of injuries which resulted in minor impairments and the

assignment of a police officer to light duty, as here, is simply not a history of a disability as defined by the A.D.A. The Petitioners have failed to demonstrate how the Second Circuit's decision on this issue implicates any of the considerations governing review on certiorari. Accordingly, the Petition for a Writ of Certiorari should be denied.

IV.

THIS COURT'S DECISION IN *SCHOOL BOARD OF NASSAU COUNTY v. ARLINE* DID NOT ESTABLISH THAT A TEMPORARY PERIOD OF HOSPITALIZATION CREATES A PER SE RECORD OF DISABILITY UNDER THE A.D.A.

Ellinger misconstrues this Court's decision in *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987), when he claims that his temporary hospitalization for the cerebral hemorrhage that he sustained in 1984 established a "record of impairment" under the A.D.A.

In *Burch v. Coca-Cola, Co.*, 119 F.3d 305 (5th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 871, 139 L. Ed. 2d 768 (1998), the Fifth Circuit rejected an identical argument in which the plaintiff relied on *School Board of Nassau County v. Arline*, *supra*, to allege that his alcoholism, which resulted in his eventual hospitalization, amounted to a substantial limitation of major life activities.

The Second Circuit cited the Fifth Circuit's decision in *Burch* which held that:

> The quoted language from *Arline* cannot be construed to obviate the requirements, explicit in the A.D.A. and its implementing regulations, that purported conditions be examined to ascertain

> whether a specific condition substantially limited a major life activity. *The A.D.A. requires an individualized inquiry beyond the mere existence of a hospital stay.*

(Emphasis added). *Burch*, *supra*, 119 F.3d at 317; *Colwell*, *supra*, 158 F.3d at 645-646; (A. 19a-20a). The Fifth Circuit further explained that:

> [a]lthough the court in *Arline* noted that the plaintiff's hospitalization established a record of impairment, the defendant had conceded that [plaintiff's] acute tuberculosis had been substantially limiting.

Burch, 119 F.3d at 317; *Colwell*, 158 F.3d at 646; (A. 19a-20a).

As the Second Circuit found in the instant case, Ellinger failed to show any substantially limiting condition and the County does not and did not concede that he suffered from such a condition. Accordingly, Ellinger's attenuated hospitalization back in 1984 did not establish a record of impairment that substantially limited a major life activity.

Arline is also distinguishable from the instant case. The Petitioner in *Arline* argued that the respondent was discharged from employment because of the danger posed to others by a possible relapse of her tuberculosis, and not because of any record of disability. Hence, this Court's focus in *Arline* was on the effect of public perception on an individual's ability to work when that individual has suffered from a contagious disease.

> [A]n impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability

> to work as a result of the negative reactions of others to the impairment.

Arline, *supra*, 480 U.S. at 283, 107 S. Ct. at 1128-1129, 94 L. Ed. 2d at __.

> Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness.

Arline, 480 U.S. at 284, 107 S. Ct. at 1129, 94 L. Ed. 2d at __.

Ellinger did not suffer from a contagious disease nor was there any evidence that the SCPD perceived that Ellinger was substantially limited in the major life activity of work.

The Second Circuit recognized that *Arline* could not be construed to mean that a temporary hospitalization creates a per se disability under the A.D.A. The Second Circuit correctly held that such a reading "would work a presumption that any condition requiring temporary hospitalization is disabling -- a presumption that runs counter to the very goal of the A.D.A." *Colwell*, *supra*, 158 F.3d at 646; (A. 20a).

Ellinger further argues that his temporary hospitalization, coupled with his six month absence following his cerebral hemorrhage, should be factored into the determination of whether the limited restrictions to his work schedule constitute a disability under the A.D.A. *See* Petition at page 19. Although Ellinger's hospitalization may have temporarily impaired his ability to work, an impairment that is "transitory or temporary does not constitute a substantially limiting condition under the A.D.A." 29 C.F.R. § 1630, App. § 1630.2(j).

> [c]ourts within this circuit and the vast majority of courts elsewhere which have considered the question

> have held that temporary disabilities do not trigger the protections of the A.D.A. because individuals with temporary injuries are not disabled persons within the meaning of the act.

Graaf v. North Shore University Hospital, 1 F. Supp. 2d 318, 321 (S.D.N.Y. 1998), *citing Boyce v. New York City Mission Society*, 963 F. Supp. 290, 296-297 (S.D.N.Y. 1997); *see Richard F. Murray v. Sysco Corp.*, 1998 U.S. Dist LEXIS 4503, *19 (N.D.N.Y. 1998); *David Curran v. All Waste Systems, Inc.*, 1997 U.S. Dist. LEXIS 22110, *15 (S.D.N.Y. 1997), *aff'd*, 133 F.3d 906 (2d Cir. 1997).

The Second Circuit was in accordance with other circuits when it held that:

> [A] seven-month impairment of [Ellinger's] ability to work, with the non-particularized and unspecific residual limitations described on his police work, is of too short a duration and too vague an extent to be "substantially limiting."

Colwell, *supra*, 158 F.3d at 646, *citing Sanders v. Arneson Products*, 91 F.3d 1351, 1354 (9th Cir. 1996), *cert. denied*, 520 U.S. 1116, 117 S. Ct. 1247, 137 L. Ed. 2d 329 (1997); *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 200 (4th Cir. 1997); (A. 20a-21a).

There is no support in the A.D.A. or in *Arline*, *supra*, for the proposition that a temporary period of hospitalization constitutes a per se disability under the A.D.A. In fact, the federal courts have consistently and correctly held that temporary impairments are not substantial limitations. For these reasons, the Petition for a Writ of Certiorari should be denied.

V.

PETITIONERS FAILED TO PRODUCE ANY EVIDENCE THAT THE SUFFOLK COUNTY POLICE DEPARTMENT PERCEIVED THEM AS SUBSTANTIALLY LIMITED IN PERFORMING ANY MAJOR LIFE ACTIVITIES.

Petitioners also argue that a perception of disability was established by the SCPD's knowledge of their "long term" light-duty status. *See* Petition at pages 22-25. The Second Circuit correctly disposed of that argument by noting that in order to establish the element of disability under a perception theory, the employer must perceive the employee as having an impairment which substantially limits the performance of major life activities within the meaning of the A.D.A. *Colwell*, *supra*, 158 F.3d at 646, *citing Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997); (A. 21a). The Second Circuit then analyzed the record and correctly concluded that the evidence adduced by the Petitioners was "insufficient to permit the inference that the County perceived the officers as having impairments that substantially limited them in one or more major life activities." *Colwell*, *supra*, 128 F.3d at 647; (A. 22a).

General Municipal Law § 207-c(3) (McKinney 1986) specifies the right of the SCPD to place police officers injured in the line of duty on light-duty status at full salary, if they are deemed capable of performing light-duty by municipal health authorities. Additionally, General Municipal Law § 207-c(1) (McKinney 1986) specifies that a police officer who is injured in the line of duty and who is deemed unfit for light-duty assignment, is entitled to receive full salary. *See Joyce v. Suffolk County*, 911 F. Supp. 92, 95 (E.D.N.Y. 1996) ("Being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity."); *Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (C.D. Ca. 1984) ("[F]or

the same reason that failure to qualify for a single job does not constitute a limitation on a major life activity, refusal to hire someone for a single job does not in and of itself constitute perceiving the plaintiff as a handicapped individual."); *Foreman v. The Babcock & Wilcox Co., et al.*, 117 F.3d 800, 806 (5th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1050, 140 L. Ed. 2d 113 (1998), ("[A]n employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes that she is incapable of performing a particular job . . .").

On this final point, as on the previous points, the ultimate purpose of the Petition for a Writ of Certiorari is to have this Court review the Second Circuit's findings on the sufficiency of the evidence under Fed. R. Civ. P. 50. Again, it is respectfully submitted that the Petition should not be granted for that purpose.

CONCLUSION

The United States Court of Appeals for the Second Circuit correctly found upon its review of the record that there was insufficient evidence to support the jury's finding that the Petitioners were disabled within the meaning of the A.D.A. A writ of certiorari should not be granted for the purpose of reviewing that determination. Petitioners have failed to show any compelling reasons for granting the Petition based upon the considerations governing review on certiorari. For all the reasons set forth above, it is respectfully requested that the Petition for a Writ of Certiorari from the Order of the United States Court of Appeals for the Second Circuit, dated October 15, 1998, be denied in its entirety.

Respectfully submitted,

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